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THE BILL OF LADING AS COLLATERAL SECURITY UNDER FEDERAL LAWS

THE desirability of the bill of lading as collateral security has been recognized in business transactions for many decades.

The foregoing fact arises from the inherent nature of the financing of transactions of foreign or domestic trade.

While it is conceivable that the bill of lading as collateral security may be used between individual business houses, yet the bulk of the transactions involving the bill of lading in this capacity, naturally gravitate toward the banking institution.

The banking transactions which involve the use of the bill of lading or of collateral security for granting credit arise in three ways in the following order of their importance.

(1) The bank's acceptance of drafts drawn against it by a customer, which instruments have attached thereto bills of lading covering the transaction.

(2) Drafts drawn on the buyer of goods and deposited with a bank for credit or as security to notes, such drafts having attached thereto bills of ladings covering the transaction.

(3) Loans made on promissory notes of the borrower which notes are secured by bills of lading. The last class of transactions, numerically and in point of importance in practice, is somewhat uncommon in the ordinary banking institution.

The above divisions bring out several points of distinction that have an important bearing on the practical value of the bill of lading as security.

THE BANK ACCEPTANCE

In the first class, the bank, at the time of accepting the draft drawn on it by the seller, in pursuance of an arrangement made by the buyer with the bank, actually acquires the title to the document. The bill of lading however does not benefit the banker to any extent as the goods covered by the document are designed for use in the marts of commerce. The banker therefore surrenders the bill of lading to the buyer taking in exchange, a trust receipt. The only right the banker has is the right to seize any goods that have not been disposed of, should he deem such an action necessary, or to follow the proceeds of such goods, or to obtain preferences in the event of bankruptcy of the buyer. The banker's security although

legalistically sound is somewhat academic.¹ However up to the time of the surrender of the bill of lading to the buyer, the document does possess a real tangible value as security.

Since the Federal Reserve Act² has gone into effect, the bank acceptance has risen to a most important sphere in banking credit transactions.³

THE INDIVIDUAL ACCEPTANCE

In the second class, the bank, at the time of the presentation of the draft to the drawee must surrender the document to the drawee upon the payment or the acceptance of the draft. The draft drawn on *demand* or *sight* has a real security back of it—the bill of lading is not surrendered until the draft is paid. However where the draft is drawn a certain period after date or after sight or demand, thirty, sixty or ninety days—a different situation is presented.

A sale made with the understanding that the vendor (the drawer) is to draw on the vendee for the amount on a thirty, sixty or ninety day basis, is impliedly stating that if the draft is accepted the bill of lading is to be surrendered to the drawee, free from any restrictions that the drawee is to give a trust receipt in return.⁴ After the

¹ The bill of lading under a transaction of this kind must be "shipper's order" and not "consignee's order." If consignee's order, the title has already passed to the consignee.

The trust receipt is an acknowledgment of its goods, that the goods belong to the bank and the proceeds will be used to liquidate the indebtedness. Furthermore, the goods wherever possible will be "earmarked" to show ownership in the bank.

If the goods are not "earmarked" there is a strong probability that the "trust receipt" will be put on a parity with the mortgage or conditional sale, and will not be binding on innocent third persons or creditors, so as to insure the bank's priority in insolvency proceedings.

² Section 5 of the amendment to the Act passed June 21, 1917, enlarged the powers of the member banks to accept drafts drawn on them. The limitation on such acceptances are,

- (1) That the maturity cannot exceed six months.
- (2) The goods must be readily marketable staples.
- (3) The draft must have attached thereto documents conveying or securing title to the goods. (The inference is that shippers' order bill of lading duly indorsed must be attached.) The draft furthermore must relate to the transaction covering the documents of title attached.
- (4) There is a limitation as to the amount which a bank may accept.

³ The report of the Federal Reserve Board of Sept. 1st, 1917, page 721, showed \$63,629,100.00 outstanding bankers acceptances purchased by the Federal Reserve Banks in the open market.

⁴ Benjamin on Sales, 2nd Edition 102, and cases cited.

Under Section 20-554 Uniform Sales Act, if the bill of lading attached to the draft is drawn "*consignee's order*," there is no doubt that the drawee is entitled to the bill of lading when he accepts the instrument. Where the bill of lading is to the "*consignor's order*," by a fair construction of the statute he also is entitled to the bill of lading, free from any restriction. The latter case however affords more room for the contention that a trust receipt should be given. In the first situation, title to the goods had passed to the consignee, when delivered to the carrier, in the second situation, the title to the goods had not passed when delivered to the carrier.

The bill of lading attached to the draft drawn on the individual, can be put on a

compliance with the condition, the bank has no collateral security, its security being the general credit responsibility of the acceptor and the drawer. But as in the case of the bank acceptance, up until the surrender of the bill of lading, the document possesses a real tangible value as security.

A bank presenting a draft for acceptance whether for a banker's acceptance or for an individual acceptance, makes no representation that the attached bill of lading is genuine and is what it purports to be.⁵

THE STRAIGHT LOAN

In the third class the bill of lading whether shipper's or consignee's order is a real security for the loan made. However if the shipper has made the loan, the bill of lading should be to the "shipper's order", for if a loss occurs, the bank has recourse against the common carrier, with certain exceptions which will be noted subsequently. If the bill of lading read to the "consignee's order", the shipper has the vendor's lien, and if such document is pledged, the pledgee seemingly does acquire the lien. But the title has already passed to the consignee and if a loss occurs in transit, the pledgee has no recourse against the carrier. The consignee's order bill of lading is effective security only when pledged by the consignee.

In the event that the sale to the consignee is one where the vendor's lien does not obtain, the holder of the bill of lading "consignee's order" does not acquire any right and the document does not possess any value when pledged by the shipper. To illustrate—the consignee has paid for the goods covered by the document or has otherwise contracted so there is no lien.

THE BILL OF LADING UNDER THE POMERENE ACT

Under the Pomerene Act⁶ and the decision of the Interstate Commerce Commission⁷ the bill of lading has been standardized and

parity with the bill of lading attached to the banker's acceptance, providing the bank make an arrangement with the drawer, that all contracts with prospective drawees must incorporate a provision that title to the goods shall not pass until the accepted draft is paid. In some instance this procedure may be extremely advisable.

⁵ Section 36 Pomerene Act. The rule announced by Section 36 is however a well recognized rule in English law.

⁶ Public Act No. 239, approved Aug. 29, 1916, covers shipments evidenced by bill of lading from any territory in the U. S. or District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country.

The Pomerene Act, "The Uniform Bill of Lading Act of the Commissioners," is in force in fifteen states.

⁷ Vol. XIV Interstate Com. Com. Reports 346.

made exceedingly reliable for collateral purposes, so far as legal rules are concerned. The bill of lading under the Act and the decision of the Commission are of three kinds.⁸

- (1) The "shipper's" or "consignor's order" bill of lading.
- (2) The "consignee's order" bill of lading.
- (3) The "straight" bill of lading.

As the three different forms of bills of lading possess differences from the point of view of affording security for the advancement of value, it may not be amiss to discuss the evolution of the bill of lading.

The outstanding point of difference between the "straight" and "order" bill of lading, is the presence of the words of negotiability⁹ in the latter and the absence in the former. This distinction has been recognized for many years in the law.¹⁰

The English law with some diffidence did finally reconcile itself to the doctrine, so contrary to the spirit of the common law, that a document can be used as a symbol for the concrete. In the early part of the 19th century the insertion of the words of negotiability in a bill of lading did accomplish this purpose,¹¹ and the absence of the words¹² of negotiability, for instance in the straight bill of

⁸ To obviate any confusion, the colors are specified.

The "order" bill of lading ("shipper's" or "consignee's order") is yellow.

The "straight" bill of lading is *white*.

⁹ The words of negotiability are "order" or "bearer." In the standard bill of lading the words "order of" are used.

¹⁰ *Berkley v. Watling*, 7 A and E 29.

¹¹ The instruments in use were concise in their simplicity free from any conditions other than those implied by law.

"Shipped, in good order and well conditioned, by John Watling, in and upon the good ship called the Search, whereof John Blyth is master, for this present voyage, and now lying in the port of Great Yarmouth and bound for Newcastle, 168 quarters of wheat, being marked," &c., "and are to be delivered in the like good order and well conditioned at the aforesaid port of Newcastle," * * * "unto Mr. John Berkley, or to his assigns, he or they paying freight for the said goods, nine shillings," &c. "In witness whereof, the master or purser of the said ship hath affirmed to two bills of lading." &c. Dated Great Yarmouth, 29th April, 1835. *Berkley v. Watling*, 7 A and E 29.

"Assigns" seemed to satisfy the requirement of negotiable words. In *Grant v. Norway*, 10 C. B. 665, the words "unto order or assigns" were used.

¹² The general rule on the subject of negotiability is that if the words of negotiability are present in a bill, the effect of such words is not changed by stamping the words "non-negotiable" on the face of the instrument, or by any recital in the document that it is "non-negotiable." The Pomerene Act, Section 3, provides that such a stamping or recital, to be effective, shall be specifically consented to by the shipper, in writing upon the bill. The effect is to have a separate agreement of the shipper which must be written on the bill of lading itself.

To the same effect is Section 30 of the Uniform Sales Act.

lading,¹³ means that the document in question is not a symbol of tangible goods.

The common law however went no further than holding the document to be a symbol—it never went so far as to hold that a person having no title to the document could give a valid title to another, although the law of bills and notes had reached the contrary conclusion early in its history. The bill of lading being a representative of the goods, a thief or anyone having no title could not transfer title thereto to a *bona fide* holder¹⁴ for value.¹⁵

With the increase in the commercial importance of the bill of lading, the desirability of effecting the transition to the rule of commercial paper, was felt in business circles. But no court decision could ever hold logically that a document¹⁶ that is a representative of goods, should ever be subjected to a rule different from that applying to the goods themselves. If this transition were ever made, it would be done by legislative enactment. The Pomerene Act¹⁷ did effect this transition.

The negotiation of the instrument of lading is practically the same as that of an ordinary negotiable instrument such as a bill or note. If the bill of lading is deliverable to "order" and indorsed in blank by the person to whom payable, the title to the document passes by delivery.¹⁸ If the bill of lading is deliverable to a certain person's order

¹³ Section 2 of the Pomerene Act—"That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill."

Under Section 6 of the "Act" it is provided that a straight bill should be plainly marked "Non-Negotiable" or "Not Negotiable." This section of the statute is directory merely, and does not carry any penalty for failure to mark as designated. A failure to insert the marking will not give the bill of lading the characteristics of negotiability, either between the parties or as to the carrier.

¹⁴ The tests of "bona fides" and of "value" are the ordinarily accepted ones applicable to the commercial paper. Section 7 of the Pomerene Act holds that the shipper's order bill of lading, which has a notation thereon to notify certain individuals, etc., that the goods covered by the bill of lading have arrived at destination, is not constructive notice of any equities that a third person may have in the document.

¹⁵ This aspect of the question was thoroughly discussed in *Shaw v. R. R. Co.*, 101 U. S. 557. See further Ames' Cases on Bills and Notes, Vol. 11, p. 782, for the general American view and further authorities.

¹⁶ The bill of lading "*consignee's order*" as a symbol of ownership is of course dependent upon who submits the document for security. If the consignor attaches the document to the draft drawn on the buyer the holder of the draft retains a vendor's lien if not inconsistent with the terms of the sale—if the consignee uses the bill of lading, the document is in effect a symbol of ownership. There may be some doubt, although very slight, whether a holder of the draft drawn on the consignee is entitled to the vendor's lien without a *specific* assignment of the contract to him.

¹⁷ Section 30 and 37. The fact is assumed that the bill of lading at the time it was lost, stolen, etc., was indorsed so as to be in a deliverable state, i. e., deliverable to bearer.

The Uniform Sales Act, Section 132 B, also provides the same rule as Section 30 and 37 wherever such a ruling is desired by states adopting the Act.

¹⁸ Section 27 Pomerene Act.

it may be negotiated by indorsement to another person's order and so on.¹⁹ The transferee of such instrument assumes the same contractual relationship with the carrier that the shipper did in the first instance—in other words the carrier must hold the goods for the transferee.²⁰

In the matter of warranties²¹ that a transferor or pledgor assumes, the Pomerene Act²² outlines all that are necessary to protect the transferee viz., genuineness,²³ right and title to transfer, free from any defenses, and the *merchantability* and existence of the goods covered by the instrument. The transferor²⁴ however as-

¹⁹ Section 28 and 29 Pomerene Act.

²⁰ Section 31 *SSb*.

²¹ These warranties may be of a decided value if a right of recourse is lost on the negotiable instrument to which is attached the bill of lading. To illustrate. If X draws on Y and deposits the instrument with the Z Bank, and the Z Bank through oversight or negligence, releases X from his liability of drawer by a failure to properly present or notify of the non-payment of the draft, the Z Bank may possibly have recourse against X on the warranties.

²² Section 34. See further Section 37. Unif. Sales Act and *Shaw v. R. R. Co.*, 101 U. S. 557, and *Mido v. Geissmann*, 17 Ill. App. 207.

²³ Duplicates and Bills in a Set.

The question of the duplicate bill of lading and of the bill of lading issued in sets, is somewhat confusing.

The question obviously has no application to the *straight* bill of lading.

The order bill of lading may be issued in sets, only where the shipment covered by the document is to any point in Alaska, Panama, Porto Rico, the Philippines, Hawaii or *foreign countries*. The bill of lading need not be marked as "of a set" or marked "duplicate."

If a bill of lading is issued in sets where the shipment is destined to any point in the Continental United States, anyone who purchases a set in good faith for value, can maintain an action against the carrier. The carrier therefore by violating the above provision of the statute may subject itself to two or three liabilities, depending upon how many sets it has issued.

The bill of lading (domestic) issued as above in duplicate or in sets, must be *plainly marked duplicate* or by words to that effect.

Section 4 and 5 Pomerene Act.

Therefore, bills of lading covering goods destined to points outside of the Continental United States excluding Alaska, should have determined whether or not the documents are part of a set. The bill of lading covering goods destined to a point in the Continental United States, excluding Alaska, is not subject to such *outside* inquiry as a duplicate bill or a bill of lading part of a set shows that fact on its face.

²⁴ The right of specific performance for the failure to indorse where such indorsement was omitted by the transferor is somewhat larger in scope than the right where a negotiable bill or note is concerned. In the latter case where the omission of the indorsement does not preclude the indorsee from suing in the indorser's name, the right of specific performance does not lie. Otherwise the right subsists. For instance if J signs for the accommodation of X the payee, and X transfers to Z, but fails to indorse the same, Z has no right of specific performance against X. But if the transaction between J and X is not accommodation, then the right of specific performance does exist.

Where the indorsement has been omitted from a bill of lading, the right of specific performance lies to supply the indorsement. As in the case of a bill or note, the indorsement is effective when made, not when it should have been made. Section 33 Pomerene Act. Section 35 of the Uniform Sales Act is to the same effect.

sumes²⁵ no liability if the common carrier fails to perform the obligation of safe carriage of the goods.²⁶

BILLS OF LADING AVAILABLE FOR COLLATERAL PURPOSES

As a general proposition the *straight* bill of lading is not of any worth for the purposes of collateral security, and in this connection it might be well to note that live stock²⁷ shipments are never on an order bill of lading but on a straight document.

There is only one situation²⁸ where the straight bill of lading can be used theoretically for collateral security. If by the terms of sale the shipment is F. O. B. destination, the title does not pass to the consignee until destination is reached.²⁹ But this theoretical security can only be valuable where a loss has occurred on the carrier's lines. A security dependent on a casualty is somewhat undesirable. The straight bill of lading does not carry the feature of the vendor's lien.

The straight bill of lading however is strong evidence that the consignee is indebted to the shipper. A draft with a straight bill of lading attached can be valuable, if there be an accompanying document assigning conditionally to the bank, the account against the drawee covered by the shipment. The condition of the assignment to be that "the assignment of such account is not to be effective against the drawee if the draft in question is paid or accepted," as the case may be.

The bill of lading "consignee's order" is valuable as collateral security when offered by the consignee. When offered by the consignee it is a strict vesting of title in the pledgee for the purposes of securing the loan. However when offered by the shipper, the pledgee receives only a vendor's lien, if any, which may, from a practical point of view, be sufficient. But in the event of a loss of the shipment while in the custody of the carrier the loss falls on

²⁵ In the matter of the scope of persons affected by the warranties, the rule applicable to bills of lading differs somewhat from rule applicable to the bill or note. Where title passes by delivery, the warranties in regard to the bill of lading attach to every one in the chain, irrespective of the appearance or non-appearance of the names on the bill of lading. Thus if X signs and delivers to B, who delivers to C who delivers to D, X, B and C have made the warranties to D. Under the Negotiable Instruments Law, D can only look to C or X for a breach of the warranty.

²⁶ Section 35.

²⁷ Form 6 adopted by carriers in Official Classification Territory.

²⁸ Section 32 Pomerene Act.

²⁹ Section 19, Rule 4, Par. 2, Uniform Sales Act.

See also Section 32 Pomerene Act, A. C. O. D. shipment, sometimes used on river shipments by boat companies, can be assigned by the shipper to a bank desiring to have security on a loan. The assignee however must notify the carrier of the assignment.

the consignee,³⁰ and the pledgee may find himself without a remedy against the drawee, because the drawee has not accepted, and also without an effective recourse against the drawer, because of insolvency or a possible discharge by laches. If the pledgee expects any difficulty, the draft drawn against the consignee should have attached thereto a conditional assignment³¹ of the account to the amount of the draft.

The "shipper's order" bill of lading is the correct method of form for security purposes. The title is in the pledgee and all the incidental rights that flow from the possession of such title. The shipper's order is by far the most used form of the bill of lading for the purposes of collateral security.

DEFENSES WHICH MAY BE INTERPOSED BY THE CARRIER TO AVOID
THE EFFECT OF THE BILL OF LADING

The defenses which may possibly be interposed by the common carrier to nullify the negotiable bill of lading are susceptible of three classifications.

(1) Those defenses affecting the goods covered by the document.

- a: The effect of recitals "Goods marked or labeled with a certain designation," "Shipper's Load and Count," "Said to Contain," "Said to be, etc.," "Contents Unknown."

In considering the question the character of the goods covered by the bill of lading should not be overlooked. Goods delivered to a carrier for transmission are of two kinds—*first*, goods the character of which is *visible*³² when received—*secondly*, goods the character of which is *not visible* when received.

Under the first classification viz., visible goods, the carrier cannot limit its liability by any recital such as, "Said to Contain," "Shipper's Load and Count," etc., *unless the shipper did his own loading*.²³

³⁰ The right of action for damage, would obviously be by the consignee against the carrier. In the event of insolvency the amount owing by the drawee to the drawer will be considered with the general assets of the drawer's estate, against which the holder of the draft will be compelled to prove in the same manner as any other creditor.

³¹ Section 46, Par. 3, Uniform Sales Act, provides in substance that if delivery to the carrier is such that title passed to consignee when delivered, the shipper must notify the consignee so that he can insure the goods. If it is customary to insure and the shipper fails to notify the consignee, the consignee is discharged. The assignment therefore may not be under certain circumstances a very effective precaution.

³² The visible or bulk goods would be chiefly grain, coal, machinery, etc., in fact any kind not concealed by wrapping, canning, or boxing. Crating *which does not conceal* the identity of the goods would be considered visible classification.

²³ Section 21 Pomerene Act. If the shipper did the loading and the carrier did not state such fact by a "Shipper's Load and Count" or other designation, the shipment is

The question however is this, is this ruling limited to goods in the bill of lading which are primarily described by weight, such as the various grains, coal, metal, etc.? Can a loading by the shipper of a car load of automobiles or other *specific visible* articles, be also limited by a recital of "Shipper's Load and Count?" Under a fair construction of section 21 of the Act it would seem that a carrier can do so.

But if the shipper maintains adequate facilities for weighing and the facilities are made available³⁴ to the carrier, the recitals of "shipper's load and count," etc., are of no effect.³⁵

Under the second classification, viz., package goods, or other goods which are not visible, the carrier *can limit* his liability³⁶ as to contents by a recital of "contents unknown" or "said to contain" or words of that purport, and the *carrier can do so, whether it does the loading or whether the shipper does the loading*. If this rule did not obtain the carrier would be practically at the mercy of the shipper.³⁷ The carrier however cannot dispute the number of packages recited in the bill of lading, except where the shipper did the loading, and the carrier had marked the document properly.

the same as if the carrier had done the loading. The carrier to take advantage of the shipper's loading must do the overt act of marking the documents. See further, note 36.

³⁴ Last sentence, Sec. 21. The Pomerene Act states the procedure. The shipper however must take the initiative and request the carrier to send its agent to verify the contents of the car. The usual custom is for shippers to load their own shipments, if in carload lots. But the mere fact that the bill of lading covers a car load lot, is not notice to the holder of a bill of lading that it is "Shipper's Load and Count" unless such fact is recited in the document.

³⁵ The "Shippers Load and Count" feature of a bill of lading, etc., is very vexatious and insecure to a banker who may be granting loans on this form of security. If the drawee banker is receiving the document on a banker's acceptance, he can insist on a guaranty covering the bill of lading from the banker presenting such item, or the banker who handled the bill of exchange in the first instance. However, the banker who handles the bill of exchange, other than the drawee banker, has not this opportunity so readily.

³⁶ Section 20 and 21 Pomerene Act.

³⁷ A somewhat classical plot would be the following: X procures several thousand empty tins and fills the same with water and puts labels thereon designating the contents to be condensed milk. The bill of lading shows delivery of 100 or 200 hundred cases of milk. X draws on a fictitious drawee and deposits the draft with the bill of lading attached. Under ordinary circumstances the banker has no hesitancy in accepting the instrument as security. The bill of lading could also be used for straight collateral purposes. The carrier could not very well puncture each can to ascertain whether it contains milk or water. Facts analagous to the above were present in *Miller v. R. R. Co.*, 90 N. Y. 430. The question logically raised is this—is a recital of goods which are concealed by boxing, crating, etc., conditioned upon the actual presence of the goods described within the package? In other words need a carrier *specifically* recite in the latter situation "contents unknown," etc., or is such fact *implied*. The general rule is that such fact is not implied, but that the carrier must so state. *Miller v. R. R. Co.*, 90 N. Y. 430, where the bill of lading recited "eggs" where as a matter of fact the barrels contained saw dust.

b: The non receipt of the goods by the carrier.

The most common form that a defense took prior to the enactment of the Pomerene Act, was that the carrier *did not receive* the goods from the shipper which were recited in the bill of lading. But as the element of estoppel was present against the carrier in such a defense by a *bona fide* holder, there arose the possibility of the injection of many nice distinctions that could and did confuse the question. There are therefore the following distinctions that should be taken into consideration to clearly understand the unsatisfactory state of the former law.

The distinctions center around the various states of minds of the agents of the carriers in issuing the bill of lading that may be in question.

First: The agent when issuing the bill of lading acted with a fraudulent intent.

When a situation of this kind was presented, about one half of the state courts and the Federal courts,³⁸ followed the English rule decided in the case of *Grant v. Norway*,³⁹ that the recital made by the agent is not binding on the carrier.

In *Bank of Batavia v. R. R. Co.*,⁴⁰ the New York court took exception to the Federal rule in a most excellent and irrefragable statement of logic.

"That where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation and the principal is estopped from denying its truth to his prejudice. It is the natural and necessary expectation of the carrier issuing them (bills of lading) that they will pass freely from one to another and advances be made upon their faith, and the carrier has no right to believe, and never does believe, that their office and effect is limited to the person to whom they are first and directly issued. On the contrary, he is bound by law to recognize

³⁸ "The Schooner Freeman," 18 Howard 182.

Pollard v. Vinton, 105 U. S. 7.

R. R. Co. v. Knight, 122 U. S. 79.

Friedlander v. Ry. Co., 130 U. S. 416.

Ry. Co. v. McFadden, 154 U. S. 155.

³⁹ 10 C. B. 665.

⁴⁰ 106 N. Y. 195.

the validity of transfers and to deliver the property upon the production and cancellation of the bill of lading. It is obvious also, upon the case as presented, that the fact or condition essential to the authority of the agent to issue bills of lading was one unknown to the bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business founded upon transfers of bills of lading. Of whom shall the lender inquire and how ascertain the fact? Naturally he would go to the freight agent who had already *falsely* declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight house or *examine the books*? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the verbal fact of the shipment is one peculiarly within the knowledge of the carrier and his agent and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent."

Secondly: The agent when issuing the bill of lading *knew* he never received the goods, or acted carelessly in thinking he had the goods, but did not act *fraudently*.

In *Hubbersty v. Ward*⁴¹ the court ruled on this question to the effect that the case was not distinguishable in principle from *Grant v. Norway*. And the Federal decisions seem to be in accord with the ruling and do not observe the distinction.

Thirdly: The agent when issuing the bill of lading, was imposed upon by the shipper and actually thought he received the goods, but did not in fact do so.

In *Bank v. R. R. Co.*,⁴² the court did observe the distinction brought out under the second and third classification and ruled that the carrier was estopped from denying the non receipt of the goods.

Under the Pomerene Act the Federal Courts are freed from any necessity for making nice distinctions. Section 22 of the Act *overrules Grant v. Norway* and the Federal cases which followed the principle of that decision. The carrier is not only estopped as to

⁴¹ (1853) 8 Exc. 330.

⁴² 106 N. Y. 195.

the holder of an order bill of lading, but is also estopped as to the consignee of a straight⁴³ bill of lading.

(2) Those defenses which arise out of the Bill of Lading Contract.

a: Provisions modifying the common law rule of extraordinary liability.

The first⁴⁴ important contractual provision that is present in the standard or uniform bill of lading is the one which attempts to limit the common law liability⁴⁵ of the carrier. At the common law the general reason for excusing a carrier from liability are—(1) Acts of God, (2) Acts of the public enemy, (3) The authority of law, (4) Acts of the shipper, (5) The inherent nature of the goods.

Under section one of the carrier's limitation in the Uniform Bill of Lading,⁴⁶ is the recital of limitation from liability which a carrier is already entitled to at the common law. In addition thereto the provision specifically notes *three* contingencies excusing liability which are not recognized at common law—riots, strikes and fires. The contractual provision goes further when the goods are customarily or at the shipper's request transported in open cars. In the latter case, the carrier stipulates it is under no liability for loss, no matter how the loss occurred, unless the same was caused by its negligence. Another provision in the contract is, "subject to the classification and tariffs in effect on the date of the issue of the bill of lading. This latter provision was very important under the Carmack Amendment.

⁴³ This statement is probably limited to the situations where the consignee has actually been prejudiced by the document. The ordinary situation of this character would be where the drawee (the consignee), had accepted or paid a draft to which was attached a straight bill of lading. *Armour v. R. R. Co.*, 65 N. Y. 111.

⁴⁴ Section 1 of the provisions of the Bill of Lading. The stipulations on the back of the bill of lading are very carefully referred to and are incorporated in the contract.

⁴⁵ Prof. J. H. Beale has given the history of the development of the extraordinary liability of the carrier. This extraordinary liability originally attached to all bailments, but was later modified to apply only to carriers. See Vol. 3, p. 143, *Anglo American Legal Essays*.

⁴⁶ The Uniform Bill of Lading is in effect in official classification territory. In other territories the bill of lading provision is practically the same. The carrier is not liable for damages caused by freezing, or by heating, etc., unless the contributory cause is the carrier's negligence. Dressed poultry for instance, in certain seasons will spoil if not iced; and ink, etc., will spoil if allowed to freeze. The bill of lading covering such commodities, to be good security, should have a contractual provision whereby the carrier is to "ice" or furnish heat, wherever necessary.

Circular No. 12 E of Western Trunk Lines contains the regulations and rules in reference to refrigeration, etc. Page 12, item 75, contains a list of the ordinary freight requiring such attention.

The various classifications have rules to the same effect.

The Carmack Amendment⁴⁷ to the ACT TO REGULATE COMMERCE was the first Federal statutory interference with the contractual right of a carrier to limit its common law liability. The phrasing of the statute is seemingly broad enough to achieve this result—"No contract, receipt, rule, or regulation shall exempt such common carrier, railroad, etc."

But the effect of the Amendment concerning limitation of liability was practically nullified by the attitude taken by the Federal Courts.⁴⁸ The substance of the court rulings was to the effect, that if a shipper has a choice of two freight rates, one rate which carries with it the common law liability and the other rate which carries with it the modified liability of a contract, and chooses the lower rate, the contractual provisions govern the carrier's liability. And the ruling and practice⁴⁹ that grew up under the Federal decisions, was that the shipper was deemed to have accepted the lower rate, *unless he took the initiative, and notified the carrier to the contrary*. When the shipper did do so, which was very seldom, the carrier stamped the bill of lading to the effect that the carrier was assuming the common law liability of an insurer.

The Cummins Amendment⁵⁰ is a radical interference with the practice developed under the Carmack Amendment. The phrasing of the Act is obviously broader "No contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier etc." The Cummins Amendment therefore practically restored the extraordinary Common Law liability of the carrier and sheared the carrier of the contractual⁵¹ power to modify

⁴⁷ Approved June 29, 1906.

⁴⁸ *Adams Express Co. v. Croninger*, 226 U. S. 491; *Hart v. Penn. R. R. Co.*, 112 U. S. 331.

⁴⁹ 33 I. C. C. Rep., 686.

⁵⁰ Passed March 4, 1915, effective June 2, 1915.

⁵¹ The amendment, however, carries with it a proviso in reference to goods which are delivered to the carrier, the contents of which are not disclosed to the carrier. The carrier may establish rates based on the declared value of the shipper, beyond which it will not be liable in the event of a loss. The disclosure of the contents may be by the markings, etc., on the package or may be by an oral communication. The proviso, however, has no practical bearing on the question of the bill of lading suitable for collateral security, for the document for purposes of security sufficiently describes the goods. The question is discussed at length on pp. 694-5, 33 I. C. C. Reports.

The Cummins amendment was further amended on Aug. 9, 1916, to include live stock and other goods that may have a declared value, where authorized by the Interstate Commerce Commission. The carrier's liability for live stock can be limited to the declared value. Live stock is defined as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes or other special uses."

"The Commission has issued 12 released rate orders, as follows:

Ore in Western Classification.

Ores and concentrates from Seattle, Wash., and Tacoma, Wash., to Kellogg-Wardner, Idaho.

the liability by granting preferential rates. A holder of a bill of lading therefore is not concerned with the risk of loss occasioned by any forces except those outlined at the common law. As the greater part of the losses of goods are caused by forces outside of the extraordinary casualties outlined by the common law, the holder of such document is practically under no necessity to procure outside insurance for his protection.

There is however a statutory qualification affecting shipments that *originate* on navigable⁵² waters of the United States. To illustrate, a shipment from Chicago by boat to Buffalo, or to Liverpool. Under the Harter Act⁵³ carriers are not subject to the extraordinary common law liability if the vessel is "in all respects seaworthy and properly manned, equipped, etc., and the owners, etc., shall not be liable for losses arising from dangers of the sea, Acts of God, etc."⁵⁴

The holder of a bill of lading covering goods originating on waters subject to the jurisdiction of the United States, should procure insurance to safeguard himself from possible loss while in transit.

LIABILITY OF A WAREHOUSEMAN

Under Section 5 of the uniform bill of lading the carrier provides for a termination of his common law liability and an assumption of the liability of a warehouseman. The section provides that if property is not removed by the consignee within forty-eight hours, exclusive of holidays, after notice of arrival has been sent or given,

Livestock from Pacific and Southern Idaho railway stations.

Lead Ore from Gold Hill, Utah, to Salida, Colo.

Silk Ratings in the Western Classification.

Paintings or Pictures Ratings in the Western Classification.

Chrome and Manganese Ore from Waters Creek, Oreg., to Grant's Pass, Oreg., when for beyond.

Zinc ores and concentrates from Montana and Idaho points to Kansas, Missouri, Oklahoma and Arkansas points.

Ores between Stations on the Galveston, Harrisburg & San Antonio Railway.

Copper from New York Harbor points to New Jersey points.

Bills of lading that are issued on released—i. e., rates based on valuation—are plainly marked to that effect. This marking is usually done by a stamping or a printing on the bill of lading."

The Cummins Act as amended in 1916, is really a rule of damages. The extraordinary liability feature of the common carrier is unaffected and has completed the cycle. Began as extraordinary liability, had a varying career as a hybrid and ended as it began—extraordinary liability.

⁵² The common law test of navigability—does the tide affect a given stream, does not of course apply in the United States. The test is actual navigability.

⁵³ Act of Feb. 13, 1893, 27 Stat. L. 445.

⁵⁴ Hutchinson on Carriers, 3rd Edition, pp. 360-399, goes into detail defining due care under the "Act."

the carrier's liability in respect thereto is that of a warehouseman. The question however is this:

Does the provision apply if notice is sent and miscarries and is never received, or is delayed in transmission beyond the time limit fixed for removal.

The fair inference is that actual notice need not be received by the consignee of the arrival of the goods.^{54a}

b: Provisions which limit the right of suit.

The provisions of the bill of lading contract which limit the right of suit are divided into three classes.

1. Affecting the party against whom suit must be brought.

The determination of the proper party defendant arises where the shipment of goods is carried to destination over other lines in addition to the lines of the initial carrier. The question is shall the initial carrier be liable for the loss occurring on lines other than its own? In the absence of a contractual provision the initial carrier is liable. This rule is obviously a just one.

Under the Carmack Amendment the initial carrier cannot contract for any other rule except upon the consideration of a reduced rate. The Cummins Amendment of 1915 however clearly states that no arrangement no matter what form it takes, can shift the liability from the initial to any other carrier.⁵⁵ A somewhat difficult question arises under a shipment like the following. Suppose a through shipment is received from Springfield, Illinois, to Manistee, Mich. The railroad company, the initial carrier, in Chicago turns the shipment over to a lake transportation company, in whose custody the loss occurs. If the shipment had originated with the lake carrier, the Harter Act would apply. The question is does the Harter Act⁵⁶ apply as a defense to the rail carrier. Under the Cummins Amendment the question is answered in the negative *unless* the shipment is consigned to a foreign country not contigu-

^{54a} 10 Corpus Juris, Chapter XIII, page 231, discusses in full the question of liability after the goods reach destination.

⁵⁵ Under the pleadings.

The allegations of the plaintiff are (1) delivery to carrier, (2) non-receipt or receipt in damaged condition. The carrier must then plead the defense available.

Section 2 of the Uniform Bill of Lading provides—the carrier is not liable for damages, etc., to goods, except on its own lines. The provision of course is not sustainable.

While the initial carrier cannot shift the liability, the shipper or his assignee can sue the subsequent carrier or carriers. The holder of the bill of lading is not confined to the initial carrier. *Ry. Co. v. Blish Milling Co.*, 241 U. S. 190.

⁵⁶ Section 9 of the Uniform Bill of Lading provides for exemption where the "Harter Act" releases the water carrier. But the provision, under the Cummins Act is not sustainable.

ous-adjacent-to the United States.⁵⁷ In the latter situation the carrier can stipulate by contract⁵⁸ that it will not be liable. But if such a provision is not present in the bill of lading contract, the initial rail carrier of a shipment destined to a non-adjacent foreign country, is seemingly liable for a loss occurring on the high seas.

2. Affecting the time within which suit must be brought.

Under the question of time limitation there are two situations:

First: Where the goods have been delivered to the consignee, but have been delivered in a damaged state.

Second: Where the goods have never been delivered but have been lost, at least presumably so, in transit.

Under provision three of the uniform bill of lading the plaintiff in the first situation must make his claim *in writing* within six month from the time of delivery at destination, or if an export shipment within six months from delivery at port of shipment.

The plaintiff should make his claim in the second situation within six months after a reasonable time within which delivery should have been made—on export shipments, nine months after a reasonable time that a delivery should have been made at port of delivery.

If no claim is made in writing, within the time specified in the foregoing paragraph, the claim fails.

After the claim has been filed, the plaintiff can bring suit within the following time, in the first situation, two years and one day from date of delivery at destination and in the second situation, two years and one day from the time delivery should reasonably have been made.

If no suit is started within such time, the claim is barred.⁵⁹

The Cummins Amendment of March 4, 1915, provides that a less liberal time limit may be provided for in the contract—giving notice of claims ninety days—filing of claims, four months—institution of suits, two years.

Where the carrier has been guilty of negligence, the condition precedent to suit is of no binding effect.

⁵⁷ Shipments consigned to the U. S. overseas colonies are not the same as shipments consigned to a non-adjacent foreign country.

⁵⁸ The form used for export purposes is set out on Page 45, No. 44, Official Classification. The contract provides for limiting of liability when delivered to the water carrier for delivery in a non-adjacent foreign country.

⁵⁹ The condition as to time limitation of filing claims and bringing suit, is a real condition subsequent. The real condition subsequent is also present in the ordinary life and fire insurance policy. The Cummins Act calls the condition precedent, but strictly speaking this is not the correct term.

3. Affecting the amount of damages recoverable.

Except for the situations covered in note 54, the uniform bill of lading in Section 2, provides that the damages shall be computed on the basis of the value of the shipment⁶⁰ at the *time* and *place* of shipment, including any prepaid freight. The invoiced value of the goods, is fairly arrived at, is generally acceptable. However if the owner of the goods carried insurance, the carrier is entitled to such insurance. The insurance company seemingly cannot be subrogated to the rights of the owner who has effected the insurance.

4. Sundry.

The owner or consignee shall pay the freight and all other charges accruing on said property. If the carrier insists the freight must be paid in advance. Section 9 of the Bill of Lading.

Sections 25 and 26 of the Pomerene Act provide for a carrier's lien for all charges such as freight, storage, demurrage and terminal charges, and all expenses necessary for the preservation of the goods. The carrier has the right to sell such goods in the same manner that an ordinary lien holder has.

DEFENSES EXTRINSIC THE BILL OF LADING CONTRACT

The defenses extrinsic the bill of lading contract are classified for practical purposes as follows:

1. Want of title in the transferor.

This defense is no longer available by the carrier. As noted previously a *bona fide* holder of the document has title and can demand the goods covered by the bill of lading although the transferor of such title did not have any title.⁶¹

2. Want of title in the person to whom the goods are delivered.

The question arises where a thief has found the document duly indorsed by the consignee and procures delivery from the carrier.

⁶⁰ Valuable documents, articles of extraordinary value and specie not specifically rated in the tariffs, must be carried under a special agreement. Explosives or dangerous goods not fully disclosed to the carrier shall subject the owner to liability for damages caused by such goods. Sec. 6 and 7 of the "Uniform Bill of Lading."

⁶¹ An analogous question arises in the situation when the holder of bill of lading violates an injunction restraining its circulation. Does the transferee take subject to the injunction? If the rules of commercial paper were to obtain, the transferee takes free from the injunction. Section 40 of the Uniform Sales Act is not clear on the point, Section 4, par. 2, seemingly follows the rule in regard to commercial paper, that court proceedings are in the nature of a personal defense.

But Section 23 of the Pomerene Act provides that no attachment or garnishment proceedings will lie against goods for which an order bill of lading was issued, unless the bill of lading is first surrendered to the carrier.

The question is analagous to the discharge of negotiable instruments by the payor, when payment is made to a thief who presents bearer paper for payment.⁶² In the case of a bill or note the payment would be a discharge of the instrument. Section 9, S.S.C., Pomerene Act follows the same rule that obtains in regard to negotiable instruments. The person who presents an order bill of lading duly indorsed need not satisfy the requirement of a holder in due course.

3. Alteration of the Instrument.

Under Section 10 of the Uniform Bill of Lading and of Section 13 of the Pomerene Act the bill of lading while unenforceable in its altered state, is enforceable according to the original tenor of the instrument. The rule corresponds to the rule of alteration⁶³ that obtains in regard to the altered bill or note.

4. Right of carrier to deliver goods without the surrender of the bill of lading.

Where goods are destined to a point where there is no regularly appointed agent to receive such consignment, the carrier can deliver, and seemingly must deliver, without a surrender of the document. The question might arise, has a carrier a right to issue an order bill of lading to a point where it cannot demand the bill of lading when the goods are delivered. Section 5 of the uniform bill of lading provides that delivery may be made without the necessity for a surrender of the document. Whether the construction of Section 8 of the Pomerene Act would take notice of provision 5 and that the point of destination has a bearing on the necessity for the surrender of the bill of lading, is as yet a matter of doubt.

With the exception of the foregoing situation, i. e., no agent at point of destination, the carrier cannot surrender the goods without the surrender of the bill of lading, unless it chooses to incur a liability to a *bona fide* holder of the document.

A carrier, unlike a payor of a negotiable instrument, must take up the order bill of lading at the time it surrenders the goods covered by the document. There is no element of exactness of maturity involved in a bill of lading, hence a transferee has no constructive notice of defenses. Section 11 of the Pomerene Act provides that a carrier shall be liable to a *bona fide* holder for failure to take up the document when it surrenders the goods. Under Section 12, the

⁶² Section 41 of the Pomerene Act provides for criminal liability for fraudulent alteration, etc.

⁶³ Section 10, par. 4, of the Pomerene Act provides that if the carrier has notice of the defect of title it cannot safely deliver the goods. This ruling would be implied although the "Act" did not provide for the contingency of notice.

Pomerene Act, if part of the goods are delivered, such part delivery must be plainly indorsed on the order bill of lading.

The lost order bill of lading by Section 14 of the Pomerene Act, is placed on a parity with the rule that obtains in regard to the ordinary lost negotiable bill or note. The proceeding is an equitable one, the carrier being furnished with a bond indemnifying him against possible loss, and approved by the court. Until the carrier is thus indemnified it is under no obligation to surrender goods covered by the lost order bill of lading.

Rival claimants can be compelled to settle their respective claims by a bill of interpleader.⁶⁴

The mortgage effective that covers goods *at the time* such goods are delivered to the carrier for which an order bill of lading has been issued, still subsists after the issuance of such document. A purchaser of an order bill of lading assumes the risk of an encumbrance. The bill of lading therefore need not be surrendered to the carrier if the mortgagee exerts his rights under the mortgage. The carrier cannot in fairness be considered as warranting the goods free from any encumbrance at the time the order bill of lading is issued.

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⁶⁴ Section 17 and 18 Pomerene Act.